ATTORNEY FOR APPELLANT:

JASON A. CHILDERS
Hulse Lacey Hardacre Austin & Shine, P.C.
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

DEBORAH L. FARMER
ANNE E. BRANT
Campbell Kyle Proffitt, LLP
Carmel, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CONNIE WILLIAMSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 29A02-0606-CV-491
	)	
TIMOTHY WILLIAMSON,	)	
	)	
Appellee.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0603-DR-232

March 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Connie Williamson appeals the trial court's granting of Timothy Williamson's petition to modify child custody and support. We affirm in part, reverse in part and remand.

Issues

Connie raises one issue for our review, which we expand and restate as:

I. whether the trial court properly granted Timothy's motion to modify physical custody; and

II. whether the trial court properly modified Connie's child support obligation.

Facts

Timothy and Connie were married and had four children. The Williamson's eldest child, Andrew Williamson, has been emancipated. Their second child, Brenton Williamson, has reached the age of majority and is a student at Indiana University. The youngest two Williamson children—E.W. and G.W.—were born on March 31, 1989 and January 23, 1995, respectively. E.W. is a student at Noblesville High School, and G.W. is in the fifth grade at Noblesville Intermediate School.

On April 24, 2001, the trial court entered a decree dissolving Timothy and Connie's marriage. Timothy and Connie agreed to share joint legal custody of their children and that Connie would provide the children's primary residence. On July 26, 2004, the trial court modified the parties' decree and increased Timothy's parenting time so that the children would reside with him every third week.

Some time around January 2006, Connie relocated to Anderson and moved into her mother's residence while she made preparations for her upcoming wedding to Wayne Bruzzese and finalized the purchase of their new home. While Connie completed her move to Anderson and waited to move into her new home with Bruzzese, the parties agreed that E.W. and G.W. would remain in Noblesville with Timothy. Shortly thereafter, on January 6, 2006, Timothy petitioned the trial court to modify custody and child support and requested primary physical custody of E.W. and G.W. and support payments from Connie. The trial court held an evidentiary hearing on Timothy's petition on March 20, 2006 and granted that petition on May 15, 2006. Connie now appeals.

Analysis

I. Custody Modification

Connie first contends that the trial court erred by granting Timothy's custody modification request and awarding him physical custody of E.W. and G.W. In general, we review custody modification decisions for an abuse of discretion, and grant trial judges latitude and deference in family law matters. Green v. Green, 843 N.E.2d 23, 27 (Ind. Ct. App. 2006). When we review a trial court's decision to modify custody, we may not reweigh the evidence or judge witness credibility. Id. We only consider the evidence and any reasonable inferences that can be drawn from that evidence in the light most favorable to the judgment. Id.

When we review a trial court's findings of fact and conclusions thereon, we must determine whether the evidence supports the findings and whether the findings support the conclusions. Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). We

may affirm a judgment based on any legal theory that is supported by the findings. Nunn v. Nunn, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003). We will reverse a judgment only if it is clearly erroneous—where the record lacks any evidence or reasonable inferences from the evidence to support the judgment. Id. It does not appear that either party requested findings and conclusions. Thus, the trial court's sua sponte findings control only as to the issues they cover, and a general judgment standard controls as to the issues upon which the court has not made findings. Walker v. Elkin, 758 N.E.2d 972, 974 (Ind. Ct. App. 2001).

The trial court's order as it relates to Timothy's request to modify custody provides:

> The Court having conducted the In-Camera Interview [with E.W. and G.W.], the Court having reviewed its notes and the testimony in this cause of action, and being duly advised in the premises, now Finds and Orders as follows:
>
> * * * * *
>
> 2. There are material changes in circumstances that will be continuing in nature that warrant a modification of physical custody. Those changes include, but are not limited to:
>
> A.) [E.W.] is seventeen (17) years of age and will be a senior at Noblesville High School and wishes to remain in the Noblesville School district;
>
> B.) In approximately December, 2005, Respondent relocated to Madison County, living in an apartment with her Mother;

C.) At that time, so that the children could continue their education in the Noblesville School district, the parties made changes in their parenting time with the Father having primary custody;

D.) Respondent is re-married and resides in Anderson, Indiana;

E.) Both children have friends, extra-curricular activities, and in the case of [E.W.], employment in the Noblesville area.

F.) The childrens' [sic] grades have improved under the new parenting time arrangement.

3. Respondent shall have parenting time with the minor children from 6:00 p.m. Friday until 7:00 p.m., Sunday of the first, second and fourth weekend of each month. Additional parenting time and holiday and extended time shall be pursuant to the Parenting Time Guidelines or by agreement of the parties.

Appellant's App. pp. 8-9.

A court may not modify a child custody order unless the modification is in the best interests of the children and there is a substantial change in one or more of the factors set forth in Indiana Code Section 31-17-2-8. Ind. Code § 31-17-2-21. Those factors are:

(1) The age and sex of the child.

(2) The wishes of the child's parent or parents.

(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.

(4) The interaction and interrelationship of the child with:

(A) the child's parent or parents;

(B) the child's sibling; and

(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic violence by either parent.

Here, Timothy petitioned the trial court to grant him primary physical custody of E.W. and G.W. and alleged the substantial changes in circumstances necessitating this modification were:

> Connie has now moved to Anderson, Indiana, and [E.W.] and [G.W.] now reside with me. Connie and I have informally agreed to a parenting time schedule by which [G.W.] will be with Connie approximately 130 overnights per year, and [E.W.] will visit with Connie during daytime hours but will not be spending overnights with her, since he is nearly 17 years old and has a job in Noblesville . . . .

Appellant's App. p. 33.

Connie first contends there is no evidence to support the trial court's finding that E.W. wishes to remain in the Noblesville School District, a fact that we assume was communicated to the trial court by E.W. during E.W. and G.W.'s April 3, 2006 in camera

interview. The trial court was not required to make a record of that interview. See Ind. Code § 31-17-2-9(b) ("(1) a record may be made of the interview; and (2) the interview may be made part of the record for purposes of appeal."), (emphasis added); see Truden v. Jacquay, 480 N.E.2d 974, 978 (Ind. Ct. App. 1985) (noting "[t]he precatory language of the statute gives the trial court full discretion in deciding whether . . . the interview should be recorded.").

Even though the trial court was not required to include a transcript or recording of the in camera interview in the record, the trial court's finding regarding E.W.'s preference for the Noblesville School District is, in and of itself, evidence of the content of the interview. In Speaker v. Speaker, 759 N.E.2d 1174 (Ind. Ct. App. 2001), this court stated, "We further observe that the trial court's findings reveal, at least to some extent, the results of the interview, i.e. she likes her home, school, and community . . . . It was not necessary for the trial court to further include the transcript of the interview with S.S. in the record." Id. at 1178-79. We believe the same reasoning applies here and conclude that the trial court's finding is supported by the evidence.

Connie further argues that the custody modification is not supported by a substantial change in the Indiana Code Section 31-17-2-8 factors and that the modification is not in E.W. and G.W.'s best interests. We disagree.

In January 2006, Connie relocated to Anderson, where she and her fiancé have purchased a home and plan to live. Connie argues that the mere fact that she has relocated is not a substantially changed circumstance that warrants a modification of custody. In support of her argument, Connie relies on our decision in Van Schoyck v.

Van Schoyck, 661 N.E.2d 1 (Ind. Ct. App. 1996), trans. denied. In that case, we reversed the trial court's modification of custody and concluded that one parent's relocation did not constitute a substantial change in circumstances. Id. at 6. We stated, "The distance between Tammy's new home and DeWayne's home is relatively short and should not have an effect on the parents' joint custody or visitation schedule." Id.

Although we agree that a parent's decision to relocate, in and of itself, may not constitute grounds for a custody modification, the facts before us here and those presented in Van Schoyck are markedly different in one important respect—Connie's move to Anderson would require E.W. and G.W. to enroll in the Anderson School District rather than remain in the Noblesville School District. According to our recitation of the trial court's findings and conclusions in Van Schoyck, "Joshua would be bused to school if he resides with mother." Id. at 4. There is no mention in Van Schoyck of the parties' son being transferred to a different school district.

That is not the case here. Connie's move to Anderson is not merely an inconvenience. Instead, Connie's move would require both E.W. and G.W. to transfer out of the Noblesville School District. Both children have lived in Noblesville for a significant amount of time and, naturally, have friends and participate in activities in that area. In particular, E.W. has two jobs in Noblesville. A move to Anderson would constitute a substantial change in the children's school and community lives and, in E.W.'s case, his employment. Connie's move has further prompted E.W. to express his preference for making Timothy's home his primary residence so that he may remain enrolled at Noblesville High School. These are all factors delineated in Indiana Code

Section 31-17-2-8, and the trial court did not err by concluding that substantial changes related to these factors warrant a modification of custody.

Similarly, we conclude that such a modification is in E.W. and G.W.'s best interests.[1] The trial court's modification of physical custody in favor of Timothy will help provide stability in E.W. and G.W.'s social, school, and work lives. The children will still have ample time to spend with Connie on weekends and holidays without having to adjust to new schools and weekday schedules. This is particularly important in light of the children's ages—seventeen and eleven—and the fact that they have already formed strong ties to their Noblesville community. The modification is in the children's best interests.

II. Child Support

Connie next contends that the trial court erred by ordering her to pay Timothy $68.47 per week, retroactive to March 24, 2006. We will reverse a trial court's order modifying support only for an abuse of discretion, in other words, where the decision is clearly against the logic and effect of the facts and circumstances. Naville v. Naville, 818 N.E.2d 552, 555 (Ind. Ct. App. 2004). In determining whether the trial court abused its discretion, we do not reweigh the evidence or judge the credibility of witnesses; rather, we consider only the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom. Id. "Where there is substantial evidence to

[1] Connie argues that the trial court's order is erroneous on its face because it fails to find or conclude that modification is in the children's best interests. Given that the trial court's findings were made sua sponte and did not have to relate to every issue, we may affirm the judgment based on any legal theory supported by the evidence. Connie's argument in this regard is without merit.

support the trial court's determination, we will not disturb it even though we may have reached a different conclusion." Id.

Indiana Code Section 31-16-8-1 delineates those circumstances under which modification of child support is proper. Connie does not challenge the trial court's decision to modify support in and of itself, however. Instead, she contends that the trial court attributed to her a greater gross weekly income than she actually earns and that the trial court did not give her credit for enough overnight visits with the children.

The Child Support Obligation Worksheet ("the worksheet") attached to the trial court's order assigns $615 to Connie as gross weekly income, which equals $31,980 annually. On appeal, Connie argues that this figure is incorrect and that she is earning only $21,694.23 annually, or $417.20 per week working at Anderson University. Timothy argues that Connie's current salary is $10,000 less than what she previously earned working at Park Place Church of God. Timothy further argues that the trial court "was well within its right to use Mother's previous income level when determining her child support obligation . . . The trial court properly used Mother's work history when determining her child support obligation." Appellee's Br. pp. 18-19.

Timothy correctly notes that, in certain instances, a trial court may impute to a party a higher income than he or she is currently earning. "The Indiana Child Support Guidelines provide that if a parent is voluntarily unemployed or underemployed, child support shall be determined based on potential income." Miller v. Sugden, 849 N.E.2d 758, 761 (Ind. Ct. App. 2006), trans. denied. "A determination of potential income shall be made by determining employment potential and probable earnings level based on the

obligor's work history, occupational qualifications, prevailing job opportunities, and earning levels in the community." Miller, 849 N.E.2d at 761 (quoting Ind. Child Support Guideline 3(A)(3)). A trial court has wide latitude to impute income. Apter v. Ross, 781 N.E.2d 744, 761 (Ind. Ct. App. 2003), trans. denied. Here, however, we conclude that the trial court abused its discretion because the record contains no evidence that Connie is voluntarily underemployed.

Merely opting to take a job that pays less than one might have earned in the past is not enough to support a trial court's decision to impute a party's income. "[C]hild support orders cannot be used to 'force parents to work to their full economic potential or make their career decisions based strictly upon the size of potential paychecks.'" Miller, 849 N.E.2d at 761 (quoting In re E.M.P., 722 N.E.2d 349, 351-52 (Ind. Ct. App. 2000)). Our case law indicates that it is proper for trial courts to impute a higher income to a party to ensure that that party is not able to shirk his or her support obligation. Apter, 781 N.E.2d at 761. It is further proper to impute a higher income to a party in order to "fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed." Abouhalkah v. Sharps, 795 N.E.2d 488, 491 (Ind. Ct. App. 2003).

At the evidentiary hearing on March 20, 2006, Connie testified that she had recently begun working as an administrative assistant at Anderson University earning $21,694.23 annually. The trial court admitted into evidence a letter from Anderson University's human resources department confirming Connie's testimony. At the same evidentiary hearing, Timothy introduced, and the trial court admitted, a worksheet

prepared by Timothy that listed Connie's gross weekly income as $615. Nonetheless, Timothy does not dispute Connie's current income, and in his appellee's brief, he concedes that Connie is earning approximately ten thousand dollars less than she did at Park Place Church of God. This is the only evidence regarding Connie's income that was before the trial court, and none of it suggests that she is voluntarily underemployed.

There was no evidence or finding that Connie left her higher-paying job to purposely avoid paying child support or to punish Timothy or the children. See id. There was no evidence that Connie either failed to seek out or was unable to obtain a higher paying job. See id. Even if Connie did accept her position at Anderson University as part of a scheme to reduce her potential support obligation in the event that the trial court granted Timothy's petition to modify custody, there was no evidence of Connie's "employment potential and probable earnings level based on [her] work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community" as required by Indiana Child Support Guideline 3(A)(3).

The trial court erred by imputing to her a gross weekly income of $615. The mere fact that she earns less now than she used to is not enough to impute a higher income to her. We reverse the trial court's support order and remand for a recalculation of Connie's support obligation based on the evidence of Connie's current income presented at the March 20, 2006 evidentiary hearing.

Finally, the second prong of Connie's support argument is that the trial court erred by giving her credit for too few overnight visits with the children. We review the trial court's decision in this regard for an abuse of discretion. See Eppler v. Eppler, 837

N.E.2d 167, 174 (Ind. Ct. App. 2005), trans. denied. "Indiana Child Support Guideline 6 provides: "The Parenting Time Table (Table PT) begins at 52 overnights annually or the equivalent of alternate weekends of parenting time only . . . ." Clearly, the trial court's parenting time award in this case constitutes greater than 52 overnights. By having parenting time with the children every first, second, and fourth weekend, the trial court gave Connie approximately fifty percent more than the 52 overnights credited to a non-custodial parent who has parenting time on "alternate weekends." Child. Supp. G. 6. Her credit for 86 overnights, however, is greater than the sum of 52 overnights plus fifty percent, or 78 overnights. Using the baseline calculation provided by the Child Support Guidelines the trial court's assignation of 86 overnights is perfectly reasonable.

Connie argues, however, that the trial court should have given her credit for 130 overnights because that is the number of overnights Timothy testified that he estimated G.W. would stay with Connie during the course of a year. We agree with Connie's characterization of Timothy's testimony, but we reiterate that the trial court has a great deal of discretion to assign parenting time. Here, in addition to his estimate that G.W. would spend the night with Connie 130 times, Timothy also testified that he thought E.W. would spend no overnight visits with Connie because E.W. maintains two jobs in Noblesville that he works primarily on the weekends. As such, even on the days and nights that G.W. spends with Connie, E.W. is still staying with Timothy, and Timothy is responsible for E.W.'s care. Connie should not be entitled to "full credit" for an overnight where only one of the two children stays with her. The trial court did not abuse its discretion by awarding Connie 86 overnights.

Conclusion

There has been a substantial change in circumstances that justify modifying custody in favor of Timothy, and the trial court did not abuse its discretion by granting Timothy's petition to modify custody. The trial court abused its discretion by imputing to Connie a higher income than that supported by the evidence. The trial court did not err in its calculation of overnight visits to be attributed to Connie. We affirm with regard to the custody modification and attribution of overnight visits. We reverse and remand for the trial court to recalculate Connie's support obligation based on the evidence of her income presented at the evidentiary hearing.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and VAIDIK, J., concur.